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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-71407; File Nos. SR-FINRA-2013-031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving the Proposed Rule Change Relating to Participation on the Alternative Display Facility
January 27, 2014.

I. Introduction

On July 18, 2013, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend FINRA Rules 6271 and 6272 regarding the requirements for members seeking registration as FINRA Alternative Display Facility (“ADF”) Market Participants (the “Proposal”).

The Proposal was published for comment in the Federal Register on August 1, 2013.³ The Commission received three comment letters on the Proposal.⁴ FINRA responded to each of the three comment letters individually.⁵ On September 10, 2013, the Commission extended the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 70048 (July 26, 2013), 78 FR 46652 (“Notice”).

⁴ See Letter to Elizabeth M. Murphy, Secretary, Commission, from David Harris, Chairman and CEO, National Stock Exchange, Inc., dated September 9, 2013 (“NSX Letter”), letter to Elizabeth M. Murphy, Secretary, Commission, from David Harris, Chairman and CEO, National Stock Exchange, Inc., dated November 26, 2013 (“NSX Letter II”), and letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, General Counsel, NYSE Markets, dated January 7, 2014 (“NYSE Letter”).

⁵ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Stephanie M. Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, dated October 25, 2013 (“FINRA Response”); Letter to Elizabeth M. Murphy, Secretary, Commission, from Stephanie M. Dumont, Senior Vice President and Director of Capital Markets Policy,

time period in which to either approve, disapprove, or to institute proceedings to determine whether to approve or disapprove the Proposal, to October 30, 2013.⁶ On October 30, 2013, the Commission instituted proceedings to determine whether to approve or disapprove the Proposal.⁷ This order approves the proposed rule change.

II. Background

Current ADF Registration Requirements

The ADF is a quotation collection and trade reporting facility. According to FINRA, the ADF provides (1) ADF market participants (i.e., ADF-registered market makers (“ADF Market Makers”) or electronic communications networks (“ECNs” and, with “ADF Market Makers”, “ADF Market Participants”)) with the ability to post quotations or display orders in NMS stocks and (2) all member firms that participate in the ADF the ability to view quotations and report transactions in NMS stocks to the Securities Information Processors (“SIPs”) for consolidation and dissemination of data to vendors and ADF Market Participants.⁸ FINRA states that the ADF

FINRA, dated December 11, 2013 (“FINRA Response II”); and letter to Elizabeth M. Murphy, Secretary, Commission, from Stephanie M. Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, dated January 23, 2014 (“FINRA Response III”).

⁶ See Securities Exchange Act Release No. 70358, 78 FR 56967 (September 16, 2013) (SR-FINRA-2013-031).

⁷ See Securities Exchange Act Release No. 70776, 78 FR 66405 (November 5, 2013) (SR-FINRA-2013-031).

⁸ See Notice, 78 FR at 46652. The ADF was initially approved by the Commission on July, 24, 2002, in connection with the SEC’s approval of SuperMontage and Nasdaq’s registration as a national securities exchange. See Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002); see also NASD Notice to Members 02-45 (August 2002). At that time, the ADF was approved for Nasdaq-listed securities for a nine-month pilot period to provide FINRA members with an alternative to the Nasdaq systems for reporting quotations and transactions in Nasdaq UTP Plan securities. On September 28, 2006, the SEC approved amendments to extend the ADF’s functionality to all NMS stocks. See Securities Exchange Act Release No. 54537 (September 28, 2006), 71 FR 59173 (October 6, 2006); see also NASD Notice to

is also designed to deliver real-time data to FINRA for regulatory purposes, including enforcement of requirements imposed by Regulation NMS.⁹

FINRA rules provide that ADF Market Participants (i.e., either registered reporting ADF Market Makers or registered reporting ADF ECNs)¹⁰ must register as ADF market makers or ECNs before making a market or displaying orders on the ADF.¹¹ Members are required to register as ADF Market Participants by applying to FINRA, which includes certifying the member's good standing with FINRA and demonstrating compliance with the net capital and other financial responsibility provisions of the Act.¹² Before displaying quotations or orders on the ADF, ADF Trading Centers¹³ must also execute and comply with a Certification Record to certify the ADF Trading Center's compliance efforts with its obligations under Regulation NMS.¹⁴

Status of the ADF and Other FINRA Transparency Facilities

According to FINRA, no member has registered with FINRA as a registered reporting ADF Market Maker since the ADF was launched in 2002, and there have been four members

Members 06-67 (November 2006). The ADF was approved on a permanent basis for NMS stocks on January 26, 2007. See Securities Exchange Act Release No. 55181 (January 26, 2007), 72 FR 5093 (February 2, 2007).

⁹ See 17 CFR 242.600.

¹⁰ See FINRA Rule 6220(a)(3), (12), (13).

¹¹ See FINRA Rule 6271.

¹² See FINRA Rule 6271(b).

¹³ An "ADF Trading Center" is a registered reporting ADF Market Maker or registered reporting ADF ECN that is a "Trading Center," as defined in Rule 600(b)(78) of SEC Regulation NMS, and that is certified to display its quotations or orders through the ADF. See FINRA Rule 6220(a)(4); see also 17 CFR 242.600(b)(87).

¹⁴ See FINRA Rules 6220(a)(5), 6250(a)(7); NASD Notice to Members 06-67 (November 2006); see also SR-NASD-2006-091, Exhibit 3.

that, at various points in time, were registered as Registered Reporting ADF ECNs.¹⁵ Since the second quarter of 2010, FINRA states that there have been no ADF Market Participants.¹⁶

FINRA states that in 2011, it began the process of updating and migrating all of its transparency facilities (including the FINRA Trade Reporting Facilities, the Trade Reporting and Compliance Engine (“TRACE”), and the ADF) off of independent technology platforms and onto a new, single, updated technology platform known as the Multi Product Platform (“MPP”).¹⁷ FINRA originally scheduled the migration of the ADF onto MPP last, anticipating onboarding of a new ADF Market Participant no sooner than mid-2014.¹⁸

According to FINRA, several of its members have discussed the possibility with FINRA of becoming an ADF Market Participant, and some have asked whether the migration of the ADF to MPP could be accelerated.¹⁹ FINRA states that such acceleration requires delaying the migration of other FINRA facilities onto MPP, reallocating resources, shifting scheduling, and implementing ADF-specific enhancements and hosting in the new technology environment - all of which, in turn, impose significant costs on FINRA, including prolonging the substantially higher expenses associated with the legacy OTC Equity Trade Reporting Facility (“ORF”) infrastructure (i.e., legacy ORF support costs are significantly higher than the expected costs of

¹⁵ See Notice, 78 FR at 46653.

¹⁶ See id.

¹⁷ See id.

¹⁸ See id. After the ADF is migrated to MPP, however, FINRA claims that it will only have the ADF base infrastructure completed. FINRA estimates that it would take at least an additional six months to complete further specific build-outs necessary to accommodate an individual ADF Market Participant seeking to quote on or report trades to the ADF. To determine the specific build-outs necessary to support a new ADF Market Participant, a member would need to provide FINRA with estimated volume projections of quotation and trade reporting activity that would flow through the ADF. See id.

¹⁹ See id.

supporting the ORF in the new MPP technology environment).²⁰ In addition to the costs of accelerating the migration of the ADF onto MPP, FINRA claims that bringing the new ADF base infrastructure live in the MPP technology environment to accommodate an ADF Market Participant will impose significant direct costs on FINRA related to building and testing the new ADF component on the MPP infrastructure and also related to paying for SIP capacity usage allocations as well as various related costs.²¹ FINRA estimates that the MPP component re-sequencing necessary to accommodate ADF acceleration and the costs associated with bringing the ADF base infrastructure live will conservatively cost FINRA in excess of \$3 million.²²

Proposed Amendments to the ADF Rules

FINRA proposes to consolidate into a single rule (FINRA Rule 6271) the existing requirements that a member must meet to register as an ADF Market Participant and introduce new requirements that potential ADF Market Participants must meet to participate on the ADF. According to FINRA, these new requirements are intended to mitigate the substantial financial risks to FINRA of accelerating the migration of the ADF onto MPP or of building out the ADF base platform to accommodate an ADF Market Participant.²³

²⁰ See id.

²¹ See id.

²² See id.

²³ See id. For example, FINRA Rule 6271 would specify that a member seeking registration as an ADF Market Participant must file an application with FINRA, execute the Certification Record, and execute a Participant Agreement. Rule 6271(a)(1) would require a potential ADF Market Participant to file an application with FINRA in which the member would provide various specifications and certifications.

The first three requirements of the application, which specify whether the member is seeking registration in Nasdaq and/or CQS securities, certify the member's good standing with FINRA, and demonstrate compliance with the net capital and other financial responsibility provisions of the Act, are the same as the requirements currently in Rule 6271(b). The Proposal would also codify other current requirements into a single rule. See id., 78 FR at 46654.

ADF Deposit Amount

The Proposal would, in part, add several new requirements into the application that members must complete to become ADF Market Participants. The new provisions require that a member seeking to become an ADF Market Participant: (i) Provide FINRA with reasonable monthly projections of the volume of data that the member anticipates submitting to the ADF; (ii) agree to submit the ADF Deposit Amount²⁴ in five equal installments into an escrow account

²⁴

The Proposal requires potential ADF Market Participants to agree to submit an “ADF Deposit Amount” in five equal installments into an escrow account. The proposed rule change defines the “ADF Deposit Amount” as \$500,000 if the member requests that FINRA accelerate the ADF migration or if the member begins quoting on or reporting trades to the ADF within 90 calendar days after an ADF Market Participant that requested acceleration of the ADF migration begins quoting on or reporting trades to the ADF. For all other ADF Participants, the ADF Deposit Amount is \$250,000. FINRA claims that this is designed to ensure that applicable volume commitments are met.

FINRA is proposing to establish the two separate levels of the ADF Deposit Amount to reflect the differing costs FINRA claims it will incur under either of two scenarios. Because FINRA states that it will incur significantly higher costs if the migration of the ADF is accelerated at a member’s request, FINRA has proposed an ADF Deposit Amount of \$500,000 should the member request such acceleration. Additionally, to ensure that ADF Market Participants benefitting from an acceleration of the ADF onto MPP are treated equally, FINRA proposes to charge \$500,000 to any member that begins quoting on or reporting trades to the ADF within ninety (90) days after an existing ADF Market Participant that requested acceleration of the ADF migration begins quoting on or reporting trades to the ADF. According to FINRA, this amount, which, as noted above, FINRA claims is substantially lower than the actual costs FINRA will incur by amending the current MPP migration schedule reflects an appropriate balance between ensuring that FINRA is able to recover a portion of the costs associated with an accelerated migration while not representing a significant financial barrier to participation on the ADF, particularly since members can potentially recover 100% of the ADF Deposit Amount over the two-year term and up to 80% of the ADF Deposit Amount in the first quarter of their participation on the ADF through the credit structure for market data revenue described below. Moreover, FINRA believes that permitting potential participants to earn back the entire deposit amount is more equitable than charging potential ADF Market Participants a one-time payment without the ability to recover some, or all, of the amount. The Proposal reduces the ADF Deposit Amount to \$250,000 if the member has not requested an accelerated migration or does not become an ADF Market Participant within 90 days after another ADF Market Participant that had requested acceleration (*i.e.*, paid an escrow amount of \$500,000) begins quoting on or reporting trades to the ADF. According to FINRA, the lower amount reflects the fact that the costs to FINRA are

at a bank mutually acceptable to the member and FINRA on a timetable as agreed to by the member and FINRA (the “ADF Escrow Account”); (iii) agree that failing to submit quotes and report trades to the ADF for a two-year period (the “ADF Quoting Term”) will result in the forfeiture of some or all of the ADF Deposit Amount; (iv) agree that failing to submit 75% of the member’s trade and quote volume in NMS stocks to the ADF (the “ADF Quoting Requirement”) will result in the forfeiture of some or all of the ADF Deposit Amount; and (v) agree to the other ADF Deposit Terms set forth in the rule.

FINRA contends that these new provisions are designed to ensure that FINRA can recover a portion of the costs associated with accelerating the migration of the ADF to MPP and bringing a new ADF Market Participant onto the ADF if the ADF Market Participant fails to participate on the ADF as anticipated. FINRA also argues that certain provisions of the application are designed to (1) provide FINRA the information necessary to ensure the ADF can accommodate the volume of data the member anticipates submitting to the ADF and (2) establish the basis upon which FINRA will be safeguarded by ensuring that the potential ADF Market Participant will bear some of the financial responsibility should FINRA undertake the efforts and incur the costs necessary to bring the ADF Market Participant onto the ADF, only to have the ADF Market Participant fail to participate at all or at the agreed level.²⁵

significantly reduced under these circumstances because the ADF base platform will have already been migrated to MPP. However, although reduced, FINRA anticipates such costs will still be significantly higher than the \$250,000 deposit amount in such a scenario based on costs related to possible additional hardware and software deployments, paying for SIP capacity usage allocations, and costs related to general staff labor, support and testing. See Notice, 78 FR at 46654-55.

²⁵ The Proposal includes several required terms for the handling of the ADF Deposit Amount (referred to as “ADF Deposit Terms”), including the methods for ADF Market Participants to recover some or all of the ADF Deposit Amount as a result of meeting its participation commitments (or due to FINRA’s inability to meet its obligations) and methods for FINRA to receive the funds if commitments are not met. The proposed rule

ADF Market Data Rebate

The Proposal includes a means for ADF Market Participants to earn back the ADF Deposit Amount (the “ADF Market Data Rebate”). Specifically, the Proposal provides that for every \$1.00 received by FINRA from the National Market System (“NMS”) SIP data plans associated with ADF activity attributable, as determined in FINRA’s sole discretion, to the member’s trading activity on the ADF, the member shall receive \$0.50 out of the ADF Escrow Account. Thus, an ADF Market Participant could recover an amount equal to one-half of the SIP market data revenue generated by the ADF Market Participant’s trading activity on the ADF. The ADF Market Data Rebate would be paid on a quarterly basis after FINRA has received its quarterly disbursement from the NMS SIP data plans.²⁶ According to FINRA, this provides for a reasonable opportunity for FINRA to recover some of its costs of re-sequencing the MPP rollout by virtue of the SIP market data revenue split.

In addition, the Proposal provides that the ADF Market Participant is only entitled to receive an amount up to 80% of the ADF Deposit Amount pursuant to this provision and is not entitled to the remaining 20% of the ADF Deposit Amount until the end of the ADF Quoting Term, assuming its trading activity has earned the requisite market data revenue from the SIPs. To the extent that the ADF Market Participant opts to stop participating on the ADF before the end of the ADF Quoting Term or stop meeting its ADF Quoting Requirement before the end of the ADF Quoting Term (i.e., chooses to quote or trade through another trading venue), it would

change retains some flexibility in the precise terms of any agreements between FINRA and potential ADF Market Participants to ensure that any unique circumstances can be addressed by permitting de minimis additions or qualifications to the ADF Deposit Terms, provided both FINRA and the member agree to those additions or qualifications. See Notice, 78 FR at 46655.

²⁶ Charges or credits as a result of SIP audit recoveries, which typically are de minimis as compared to the overall revenue paid, would not be included in the calculation. See id.

be free to do so but could potentially forfeit some or all of the remaining ADF Deposit Amount.²⁷

The Proposal also includes certain provisions designed to protect FINRA if a member requests that the ADF be migrated to MPP on an accelerated basis or if FINRA undertakes efforts to build out the system to support the member, and in either instance, the member fails to participate.²⁸ The proposed rule change provides that one-fifth of the ADF Deposit Amount shall be released to FINRA if, in any calendar month beginning with the fourth calendar month following certification of the ADF Market Participant to quote on or report trades to the ADF, the ADF Market Participant fails to submit 75% of the member's quoting and trade reporting activity to the ADF.

Finally, the proposed rule change would make clear that a member would become an ADF Market Participant only after (i) the member received a notice of approval from FINRA that its application was accepted, (ii) the member executed the Certification Record, and (iii) FINRA executed the Participant Agreement.

²⁷ See id. If FINRA does not make the ADF available within nine months of an ADF Market Participant's first deposit of the ADF Deposit Amount into the ADF Escrow Account, one-fifth of the ADF Deposit Amount will be released from such ADF Escrow Account to the ADF Market Participant. An additional one-fifth of the initial ADF Deposit Amount will be released to the ADF Market Participant every month thereafter that FINRA has not made the ADF available, until all funds have been released from such ADF Escrow Account.

²⁸ In addition, if a member is sold (other than a sale to an entity that would otherwise meet the FINRA qualifications as an ADF Market Participant), goes out of business, otherwise does not meet its obligations, or fails to complete the process for becoming an ADF Market Participant, the member will forfeit the ADF Deposit Amount, or any lesser amount remaining in the ADF Escrow Account, and all funds will be released from the ADF Escrow Account to FINRA. See id.

III. Discussion and Findings

After carefully considering the Proposal, the comments submitted, and FINRA's responses to the comments, for the reasons discussed below the Commission finds that FINRA responded appropriately to the concerns raised and that the Proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.²⁹ In particular, the Commission finds that the proposed rule change is consistent with the provisions of (1) Section 15A(b)(6) of the Act,³⁰ which requires, in part, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, (2) Section 15A(b)(5) of the Act,³¹ which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls, and (3) Section 15A(b)(9)³² of the Act, which requires, in part, that FINRA rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

The Commission received two comment letters from the same commenter in response to the Proposal.³³ The commenter, NSX, contends that the Proposal is inconsistent with Sections 15A(b)(5), (6), and (9) of the Act.³⁴ NSX generally argues that FINRA has not demonstrated

²⁹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁰ 15 U.S.C. 78o-3(b)(6).

³¹ 15 U.S.C. 78o-3(b)(5).

³² 15 U.S.C. 78o-3(b)(9).

³³ See NSX Letter and NSX Letter II.

³⁴ See NSX Letter at 1.

that: (1) the proposed ADF Deposit Amount and credit provisions are reasonable or equitably allocated, and (2) the proposed ADF Deposit Amount, the accompanying credit provisions, and the proposed 75% quoting requirement impose an inappropriate burden on competition. The Commission also received a comment letter from NYSE Euronext (“NYSE”) that argues that the Proposal read in conjunction with FINRA’s existing ADF fees, is not consistent with Section 15A(b)(9) of the Act.³⁵

Section 15A(b)(5) of the Act mandates that “[t]he rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.”³⁶ NSX argues that that FINRA “fails to meet its burden of adequately articulating and justifying the reasonableness of the ADF Participant fees.”³⁷ NSX questions whether it is consistent with the Act for FINRA to (1) charge the same ADF Deposit Amount regardless of a potential ADF Participant’s use of the ADF and (2) offer the ADF at a cost which will be spread among all FINRA members and not just ADF Participants.³⁸ NSX argues that charging the same ADF Deposit Amount for all ADF Market Participants “appears to discriminate against smaller ADF Market Participants and may pose an unreasonable barrier of entry for them...”³⁹ NSX also contends that reasonableness of the ADF Deposit Amount and ADF Market Data Rebate can only be determined after analyzing total cost, projected volume, source of funds, and future fees. Accordingly, NSX argues, the Proposal is deficient as it does not disclose the specific percentage

³⁵ NYSE Letter at 1.

³⁶ 15 U.S.C. 78o-3(b)(5).

³⁷ NSX Letter at 1.

³⁸ Id. at 3-4.

³⁹ NSX Letter II at 6.

that the Deposit Amount is of total development costs.⁴⁰ In its second letter, NSX reiterates these concerns, stating that the proposal fails to disclose the specific percentage of total development costs that the Proposed Participant Fee represents and how FINRA intends to cover the remaining development costs, and noting that the Proposal contains “little to no information on the ADF operational costs and how FINRA intends to cover those associated costs.”⁴¹

In response, FINRA contends that it has provided enough information to demonstrate that the ADF Deposit Amount is reasonable.⁴² In particular, FINRA included detailed cost estimates regarding the accelerated ADF migration. In addition, FINRA notes in establishing the ADF Deposit Amount it considered its ability to recover costs and whether the ADF Deposit Amount would preclude potential ADF Market Participants from using the ADF.⁴³ FINRA believes that the Deposit Amounts are reasonable because they represent a portion of the costs FINRA will incur and are recoverable wholly or in part by the ADF Market Participant.⁴⁴ Finally, FINRA disputes NSX’s argument that it is required to include a forecast of all future fees as part of its analysis of the reasonableness of the fees contemplated in the Proposal.⁴⁵ FINRA also believes the additional information requested by NSX would be speculative and of limited utility.⁴⁶

⁴⁰ See NSX Letter at 2.

⁴¹ NSX Letter II at 6.

⁴² See FINRA Response at 2 and FINRA Response II at 4.

⁴³ See FINRA Response at 3-4.

⁴⁴ FINRA Response II at 5.

⁴⁵ Id. at 5 and FINRA Letter at 6. NSX also argues that the Proposal is not consistent with Section 15A(b)(6) of the Act, which provides that “the rules of an association are designed ... to protect investors and the public interest; and are not designed to permit unfair discrimination “between customers, issuers, brokers, or dealers.” 15 U.S.C. 78o-3(b)(5). Specifically, NSX claims that the Proposal may raise issues with respect to an ADF Participant’s ability to comply with its best execution obligation. See NSX Letter, at 5. FINRA responds that this concern is misplaced since the Quoting Requirement relates to posting of quotes and the reporting of trades, whereas best execution obligation

With regard to NSX’s argument that the proposed ADF Deposit Amount does not take into account the ADF Market Participant’s total quotation or trading volume, FINRA responds the fixed ADF Deposit Amount is not tied to the amount of usage since costs of on-boarding each participant are fixed and do not vary by ADF Market Participant.⁴⁷ In addition, FINRA claims that the ADF Deposit Amount is designed to defray costs but not cover costs entirely. Imposing all costs only on ADF Market Participants, FINRA argues, would discourage new ADF Market Participants from joining the ADF and reduce potential ADF revenue thereby increasing ADF-related losses.⁴⁸ Further, FINRA notes that, absent the Proposal, FINRA would incur all of the costs regarding the migration and operation of the ADF without the potential to offset such costs.⁴⁹ Finally, FINRA argues that the ADF Deposit Amount reflects an “appropriate balance between helping to defray the costs of migrating and operating the ADF while not making participation in the ADF cost-prohibitive” that is reasonable in light of projected \$3 million total costs cited in its Proposal and an equitable allocation among ADF Participants and its member firms.⁵⁰

The Commission does not believe, as NSX suggests, that FINRA has presented an insufficient basis to determine the reasonableness of the ADF Deposit Amount and Market Data Rebate. Neither does the Commission accept NSX’s argument that FINRA is necessarily required to disclose the total development and operation costs, projected volume, source of funds

implicates a broker-dealer’s handling of customer orders for execution. See FINRA Response, at 6 n. 11.

⁴⁶ See FINRA Response at 5 and FINRA Response II at 5.

⁴⁷ See FINRA Response at 3 and FINRA Response II at 5.

⁴⁸ FINRA Response at 3-4.

⁴⁹ FINRA Response at 3 n. 5 and FINRA Response II at 5.

⁵⁰ See FINRA Response at 4.

used to fund the ADF and any future fees. The Commission, furthermore, does not agree with NSX's claim that the Proposal establishes an inequitable allocation of fees among its members. Rather, the Commission believes that, by requiring individual members to provide a portion of the specific costs that FINRA would incur to accommodate a member's request to either accelerate the migration of the ADF or otherwise use the ADF, the Deposit Amount is a reasonable and equitable allocation of costs among FINRA's members. In addition, the ADF Deposit Amount and Market Data Rebate provide a fair and equitable way for FINRA to recover costs associated with onboarding a new ADF Participant while allowing an ADF Participant to earn back its deposit.

Section 15A(b)(9) of the Act provides that "[t]he rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title."⁵¹ NSX argues that FINRA fails to adequately address whether the Proposal imposes a burden on competition for other self-regulatory organization ("SRO"s) such as NSX.⁵² According to NSX, the Proposal is an unfair subsidy of FINRA's trading facility and that by charging "below cost or subsidized rates to ADF Market Participants, FINRA would have an unfair advantage against other exchanges that are offering competitive alternatives."⁵³ NSX argues that ADF users should be required to self-fund the ADF platform.⁵⁴ In addition, NSX claims that the ADF Deposit Amount and the requirement to send at least 75% of quotes and trades to FINRA amount to an unprecedented burden on competition because the ADF Quoting Requirement would make it economically unfeasible for any other SRO that provides order

⁵¹ 15 U.S.C. 78o-3(b)(9).

⁵² NSX Letter at 5.

⁵³ NSX Letter II at 3.

⁵⁴ Id. at 3-4.

delivery functionality to compete with FINRA.⁵⁵

FINRA responds that NSX's assertion that FINRA is either subsidizing the operation of the ADF or operating at a loss and that this results in an unfair competitive advantage against exchanges attempting to offer order delivery alternatives to the ADF is misleading.⁵⁶ FINRA states that the ADF Deposit Amount is not an unfair subsidy; rather it is designed to recoup expenses it incurs in connection with the addition of new ADF Market Participants and the ADF Migration.⁵⁷ FINRA notes that the Proposal is "intended to avoid the need for FINRA to subsidize all of the costs associated with" the ADF.⁵⁸ Moreover, FINRA notes that the ADF Quoting Requirement is not an unnecessary or appropriate burden on competition because it is not a requirement to use the ADF, and is only a means to earn back the ADF Deposit Amount.⁵⁹ According to FINRA, therefore, meeting the ADF Quoting Requirement is voluntary and at the discretion of an ADF Market Participant.⁶⁰

The Commission does not believe that the Proposal constitutes an unnecessary or inappropriate burden on competition. In addition, the Commission does not agree with NSX's argument that the Quoting Requirement would make it economically unfeasible for any other SRO that provides order delivery functionality to compete. To the extent that ECNs choose to use the ADF Platform because the ADF offers better facilities and a more favorable price structure, such a result is not an unnecessary or inappropriate burden on competition.

⁵⁵ Id. at 4.

⁵⁶ FINRA Response II at 2-3.

⁵⁷ See FINRA Response at 6 and FINRA Response II at 3.

⁵⁸ FINRA Response II at 3.

⁵⁹ FINRA Response at 6.

⁶⁰ Id. at 6-7 and FINRA Response II at 3.

In its comment letter, NYSE suggests that the combination of FINRA's existing ADF fee schedule contained in Rule 7510 – in which the Quotation Update Charge to be paid by an ADF Market Participant varies commensurate with the number of trades reported through the ADF by that ADF Market Participant – and the fees contained in the Proposal is inconsistent with Section 15A(b)(9) because they make it economically prohibitive for an ADF Participant to quote on the ADF but trade report elsewhere.⁶¹

FINRA responds by reiterating that the proposed ADF Deposit Amount is designed to reasonably and equitably allow FINRA to recoup costs related to the ADF migration and the addition of a new ADF Market Participant that the provision by which an ADF Market Participant may earn back some or all of its ADF Deposit Amount is designed to provide an incentive for an ADF Market Participant to remain active on the ADF and to utilize the ADF capacity that FINRA has incurred costs to provide.⁶² FINRA states that this, in turn, will reduce the likelihood that FINRA will incur unnecessary expenditures in connection with the ADF migration, and will increase the probability of FINRA recouping a reasonable amount of the costs involved with launching a new ADF Market Participant from that ADF Market Participant rather than recover those costs from fees paid by all FINRA members.⁶³ FINRA believes the only new issue raised by NYSE relates to FINRA's existing quotation fee structure in Rule 7510(b) rather than the Proposal itself.⁶⁴ As an initial matter, FINRA believes that such comments are not appropriately directed to this filing, as Rule 7510 has been previously filed and

⁶¹ NYSE Letter at 1-2.

⁶² FINRA Response III at 3.

⁶³ Id.

⁶⁴ Id.

made effective under the Act.⁶⁵ FINRA further argues that both the proposed and existing fee structure fairly impose costs on those members whose quotation and trading activity creates system capacity demands, as well as provide incentives to quote and trade report to the ADF, which also generates revenue for FINRA to support the costs of operating the ADF.⁶⁶ FINRA believes that an ADF Market Participant currently would consider both its quoting and trading activity when determining its desired level of activity on the ADF, and the Proposal, pursuant to which an ADF Market Participant would ascertain its ability to earn back some or all of its ADF Deposit Amount, is consistent with this analysis.⁶⁷ The Commission believes that FINRA has satisfied its burden to demonstrate that the Proposal is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁶⁸ that the proposed rule change (SR-FINRA-2013-031), is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁹

Kevin M. O'Neill,
Deputy Secretary.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ 15 U.S.C. 78s(b)(2).

⁶⁹ 17 CFR 200.30–3(a)(12).

